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IN THE
COURT OF APPEALS OF INDIANA

GARY LEE MEREDITH, III,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 74A01-0701-CV-23
	)	
LAURA MEGHAN MEREDITH,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE SPENCER CIRCUIT COURT
The Honorable Wayne A. Roell, Judge
Cause No. 74C01-0502-DR-68

May 3, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Gary Lee Meredith, III ("Father"), appeals the trial court's denial of his petition for custody modification and verified petition for contempt citation. We affirm.

Issues

Father presents two issues, which we restate as follows:

I. Whether the trial court abused its discretion in denying his petition for custody modification; and

II. Whether the trial court abused its discretion in denying his petition for contempt citation.

Facts and Procedural History

The evidence most favorable to the trial court's ruling is as follows. On June 17, 2000, Father married Laura Meghan Meredith ("Mother"). After the marriage, Mother moved from Phelps, Kentucky, to Father's residence in Dale, Indiana. On April 7, 2003, the couple had a son, K.M. Subsequently, Mother's parents moved to Dale, Indiana, to be near their daughter and grandson.

Father works second shift and is absent from the home between the hours of 6:00 p.m. and 3:30 a.m. When he arrives home, he goes to bed and sleeps until 11:00 a.m. Over the course of the marriage, Mother worked a series of part-time and seasonal jobs. She was K.M.'s primary caregiver. She changed his diapers, attended to his needs in the middle of the night, took him to the doctor, and fed, clothed, and bathed him. Father describes her as a "good mother." Tr. at 26.

Mother filed a petition for dissolution of marriage on February 22, 2005. The next day, the parties agreed that Mother would have custody of K.M. until the final dissolution

hearing. On December 14, 2005, the final decree was entered. The couple also signed a child custody, support, and division of property agreement, establishing joint legal custody of K.M. with Mother having physical custody subject to Father's right of visitation.

In early June 2006, Mother decided to relocate to Bean Station, Tennessee, approximately six hours from Dale, Indiana, by car. On June 9, 2006, she filed with the trial court a notice of intent to move. On June 23, 2006, Father filed a petition for custody modification. In late June 2006, Mother visited Bean Station and submitted job applications. Shortly thereafter, she and her parents moved to Bean Station, and she began working full-time at a pharmacy. Mother has many family members in Bean Station, including her brother, aunts, uncles, and grandparents. Mother and K.M. live in a fully furnished apartment in the basement of her grandparents' house. K.M.'s maternal grandmother cares for him while Mother is working.

On July 6, 2006, Father filed a verified petition for contempt citation, alleging that Mother "has willfully failed and/or refused to abide by the Court's order by denying the Father parenting time." Appellant's App. at 26. A hearing on all pending issues was held on October 3, 2006. On October 11, 2006, the trial court denied Father's petition for custody modification and his verified petition for contempt citation. Father now appeals.

Discussion and Decision

I. Petition for Custody Modification

Father argues that the trial court erred in denying his petition for custody modification. Our standard of review is well-settled.

> In general, we review custody modifications for an abuse of discretion, with a preference for granting latitude and deference to our trial judges in family law matters. When reviewing a trial court's ruling on a petition to modify custody, we may neither reweigh the evidence nor judge the credibility of the witnesses. Rather, we consider only the evidence most favorable to the judgment and any reasonable inferences that may be drawn from that evidence.

Van Wieren v. Van Wieren, 858 N.E.2d 216, 221 (Ind. Ct. App. 2006) (quotation marks and citations omitted). In the initial custody determination, both parents are presumed equally entitled to custody, but a petitioner in a subsequent modification bears the burden of demonstrating that the existing custody order should be altered. *Bettencourt v. Ford*, 822 N.E.2d 989, 998 (Ind. Ct. App. 2005). "'[I]t is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended for by appellant before there is a basis for reversal.'" *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002) (quoting *Brickley v. Brickley*, 247 Ind. 201, 204, 210 N.E.2d 850, 852 (1965)).

Here, Mother filed a notice of intent to move, as required by Indiana Code Section 31-17-2-23(a). The purpose of this statute is to afford the trial court an opportunity to modify the original custody order, if necessary. *Bettencourt*, 822 N.E.2d at 997-98. In making a determination regarding custody modification following a custodial parent's relocation, the trial court must construe the notice of intent to move statute in conjunction with the child custody modification statute, Indiana Code Section 31-17-2-21. *Id*.

Indiana Code Section 31-17-2-23, which was in effect at the time Mother filed her notice of intent to move, required the trial court to take into account two factors in determining whether to modify custody: (1) the distance involved in the proposed change of

residence; and (2) the hardship and expense for the non-custodial parent to exercise visitation rights.[1]

Indiana Code Section 31-17-2-21(a) states in relevant part that the trial court may not modify a child custody order unless "(1) the modification is in the best interests of the child; and (2) there is a substantial change in one (1) or more of the factors that the court may consider under [Indiana Code Section 31-17-2-8.]"[2] Those factors are:

> (1) The age and sex of the child.
> (2) The wishes of the child's parent or parents.
> (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
> (4) The interaction and interrelationship of the child with:
> (A) the child's parent or parents;

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[1] Father argues that the recently revised notice of intent to move statute—Indiana Code Section 31-17-2.2-1, effective July 1, 2006—should apply retroactively to this case. In addition to the two factors in the prior version, the current statute lists additional factors to be considered by the trial court upon the relocation of a custodial parent:

> (3) The feasibility of preserving the relationship between the nonrelocating individual and the child through suitable parenting time and grandparent visitation arrangements, including consideration of the financial circumstances of the parties.
> (4) Whether there is an established pattern of conduct by the relocating individual, including actions by the relocating individual to either promote or thwart a nonrelocating individual's contact with the child.
> (5) The reasons provided by the:
> (A) relocating individual for seeking relocation; and
> (B) nonrelocating parent for opposing the relocation of the child.
> (6) Other factors affecting the best interest of the child.

Ind. Code § 31-17-2.2-1(b). Generally, statutes are applied prospectively, unless there are "strong and compelling" reasons to do otherwise. *In re Estate of Bowers*, 849 N.E.2d 1212, 1217 (Ind. Ct. App. 2006). Even under the argument that the statute is merely procedural or remedial, retroactive application is the exception. *Metro Holding Co. v. Mitchell*, 589 N.E.2d 217, 219 (Ind. 1991). Father has failed to convince us that the revised version of this statute should apply. Moreover, application of this statute would not change our determination.

[2] Father states, and Mother agrees, that the trial court may modify a prior custody order only upon a showing that there is a "substantial and continuing change of circumstances" and that "the change in circumstances makes the existing order unreasonable." Appellant's Br. at 5-6. We note, however, that the version of the custody modification statute that contained this standard was repealed long ago. *See* Ind. Code § 31-1-11.5-22(d) (amended by P.L. 139-1994 and later repealed by P.L. 1-1997, § 157).

(B) the child's sibling; and
(C) any other person who may significantly affect the child's best interests.

(5) The child's adjustment to the child's
(A) home;
(B) school; and
(C) community.

(6) The mental and physical health of all individuals involved.
(7) Evidence of a pattern of domestic or family violence by either parent.
(8) Evidence that the child has been cared for by a de facto custodian . . . .

Ind. Code § 31-17-2-8.

As for the factors in the notice of intent to move statute, there is clearly a significant distance between Father and K.M., and Father is experiencing some hardship and expense in exercising his visitation. He must drive several hours to pick up K.M. for each visit, and he must drive several hours to return him to Mother. Clearly, it is now inconvenient for Father to exercise his visitation rights, and, as he points out, K.M. has to spend significant periods of time in a carseat on trips between Indiana and Tennessee. However, "mere inconvenience to the non-custodial parent and the child resulting from a change of residence will not constitute a basis for changing custody to the other parent." *Hoos v. Hoos*, 562 N.E.2d 1292, 1294 (Ind. Ct. App. 1990).

Pursuant to Indiana Code Section 31-17-2-23, Father was required to show that a modification of custody would be in K.M.'s best interests and that there is a substantial change in one or more of the factors in Section 31-17-2-8. Father argues primarily that Mother's relocation will negatively impact his relationship with his son because of the distance between them; however, he seems comfortable with the care his son receives in Bean Station. In fact, he testified that Mother was a "good mother" and that her relatives

were "good folks[.]" Tr. at 26, 21.[3] He contends that K.M. cannot spend as much time with Father's siblings and parents in Dale, Indiana. Mother counters that K.M. is now able to spend more time with her extended family in Tennessee. Father stated that he currently has a "wonderful relationship" with K.M., but he expresses concern that as K.M. gets older, the distance will hurt their relationship, that K.M. may be forced to choose between activities in Kentucky and visiting Father, and that Mother will move again. *Id*. at 6, 28. At this point, these concerns are merely speculative and cannot support a modification of custody.

In sum, while we recognize the logistics issues that Father and K.M. will experience as a result of Mother's relocation, we cannot conclude that the evidence positively requires a finding that modification of primary physical custody to Father is in the best interests of K.M. and that there is a substantial change in one of the relevant factors of Indiana Code Section 31-17-2-8. The trial court did not abuse its discretion in denying Father's petition for modification of custody, and therefore, we must affirm.

II. Petition for Contempt Citation

Father filed a petition for contempt citation, alleging that Mother "has willfully refused to abide by the Court's [visitation] order[.]"[4] Appellant's App. at 26. He argues that the trial court erred by denying his petition. The contempt power of the court may be used to compel a parent to comply with a visitation order. *Deckard v. Deckard*, 841 N.E.2d 194, 203 (Ind. Ct. App. 2006). Whether a party is in contempt is a question within the trial court's

[3] At the hearing, Father testified that during one of his visitation periods, "[K.M.] woke up five times crying because his teeth hurt" and that several of K.M.'s teeth are "rotted out." Tr. at 9. He did not present any dental records or other evidence to support this claim, however.

discretion. *Van Wieren*, 858 N.E.2d at 222. We will not reverse the trial court's decision unless we find an abuse of that discretion. *Id.* at 223. An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before the court or is contrary to law. *Id*. Again, we will neither reweigh the evidence nor judge the credibility of witnesses. *Id*.

The child custody, support, and division of property agreement signed by Mother and Father sets forth the following terms regarding Father's visitation:

> [Father] shall have visitation with [K.M.] from 10:00 a.m. on Saturday until 12:00 noon on Monday so long as he is working second shift or until such time as [K.M.] starts school. In addition, [Father] shall have visitation with [K.M.] for a period of four (4) hours on each Thursday and in accordance with the Parenting Time Guidelines during all holiday visitation periods. [Father] shall have extended parenting time, including one-half (1/2) of the summer vacation period as provided in the Indiana Parenting Time Guidelines beginning in the summer of 2006. In the event that [Father] works first shift or at such time as [K.M.] starts school, visitation shall be from 5:00 p.m. on Friday until 5:00 p.m. on Sunday unless agreed otherwise by the parties and at all other times as provided by the Indiana Parenting Time Guidelines.

Appellant's App. at 19-20.

The evidence shows that Father did exercise visitation during four full weeks of the summer, pursuant to the terms of the agreement. He notes a few weekends during which his parenting time was shortened because Mother requested that he return K.M. a few hours earlier or pick up K.M. a few hours later than usual. He missed seven Thursday evening visits because K.M. was in Tennessee. Father characterizes these missed Thursday visits as times that he "wasn't allowed to have [K.M.]" Resp. Exh. 1. As Mother points out,

[4] While he did not phrase it as such in his petition before the trial court or in his appellate brief, Father accuses Mother of willful disobedience of a process or order, a form of indirect contempt of court. *See*

however, there is no evidence that she refused visitation on these dates. Presumably, Father did not see K.M. on these dates because of the traveling distance. Mother also testified that Father chose not to exercise his visitation rights at times, such as New Year's Eve of 2005, when he returned K.M. a day early because "he had plans." Tr. at 41. She stated that she wants K.M. to have a good relationship with Father and that she will do "everything possible" to encourage such a relationship. *Id*. at 44.

In presenting this issue for our review, Father asks us to reweigh the evidence and judge the credibility of the witnesses, which we simply cannot do. Considering the evidence most favorable to the trial court's decision, we find no abuse of discretion in its denial of Father's petition for contempt citation.

Affirmed.

BAKER, C. J., and FRIEDLANDER, J., concur.

Ind. Code § 34-47-3-1.